

<hr/>		X
KLAUBER BROTHERS INC.,	:	Civil Action No. 11 CIV 4985
	:	(PGG)
Plaintiff,	:	
	:	
vs.	:	<b>DECLARATION OF PHILIP H.</b>
	:	<b>GOTTFRIED IN OPPOSITION</b>
RUSSELL-NEWMAN INC. and	:	<b>TO DEFENDANT’S MOTION</b>
THE BON-TON STORES, INC.,	:	<b>TO DISMISS</b>
	:	
Defendants.	:	
	:	
<hr/>		X

1. I am an attorney duly licensed to practice law before the Courts of the State of New York. I am a partner at Amster, Rothstein & Ebenstein LLP, attorneys of record for the plaintiff, Klauber Brothers, Inc. (“Klauber”). I make this declaration in opposition to the motion to dismiss of defendant The Bon-Ton Stores, Inc. (“Bon-Ton”).

513486.1

3. Attached hereto as Exhibit 2 is a true and correct copy of a letter dated May 15, 2012 from Wilbur King of the U.S. Copyright Office to me and of Copyright Circular 14 which he enclosed, entitled Copyright Registration For Derivative Works.

4. Attached hereto as Exhibit 3 is a true and correct copy of a picture of a Maidenform "Charmed" undergarment purchased from Bon-Ton (the "Charmed Infringement"), as well as true and correct copies of the Bon-Ton webpage offering the Charmed Infringement for sale, and the invoice from Bon-Ton for the Charmed Infringement.

5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: New York, New York  
May 25 , 2012

By:   
Philip H. Gottfried

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of the foregoing to be served by electronic mail this 25<sup>th</sup> day of May, 2012 on the following pursuant to the parties' agreement:

Vanessa C. Hew  
Suzan Jo  
R. Terry Parker  
1540 Broadway  
New York, NY 10036  
[vchew@duanemorris.com](mailto:vchew@duanemorris.com)  
[sjo@duanemorris.com](mailto:sjo@duanemorris.com)  
[tparker@duanemorris.com](mailto:tparker@duanemorris.com)

AMSTER, ROTHSTEIN & EBENSTEIN LLP

  
Philip H. Gottfried

# **EXHIBIT 1**

**Marc Jason**

---

**Subject:** FW: 1-758412372 Pattern 7087 - Matter # 46628/86 and 46628/48

-----Original Message-----

From: Copyright Office [<mailto:cop-ad@loc.gov>]

Sent: Friday, May 11, 2012 2:24 PM

To: ptodocket

Cc: [wkin@loc.gov](mailto:wkin@loc.gov)

Subject: 1-758412372 Pattern 7087

Dear Philip Gottfried, Esq.:

I have compared the above work to the copy of the previously registered work that you supplied, and I can't tell the difference. It seems to be the same work, only smaller. We do not register changes in size or format of a previously registered work. If only the size had changed, the copyrightable authorship contained in the work would already be protected by the earlier registration.

But assuming that there is new artwork, as is stated on your application, could you supply more detailed identifying materials? Or point out the specific differences between the two? I just can't see any.

When replying, please cc my address at [wkin@loc.gov](mailto:wkin@loc.gov). You may also call me direct at 202-707-0333.

Sincerely,

Wilbur King  
Registration Specialist  
Visual Arts Division  
U.S. Copyright Office

When replying to this email, please include the following thread id (entire line) within the body of your response to expedite routing to the correct office.

[THREAD ID:1-CNUBZG]

# **EXHIBIT 2**

4/26/12  
PGL



**United States Copyright Office**

Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 • [www.copyright.gov](http://www.copyright.gov)

May 15, 2012

Amster, Rothstein & Ebenstein LLP  
Attn: Philip Gottfried, Esq.  
90 Park Avenue, 21st Floor  
New York, NY 10016  
United States

Correspondence ID: 1-COSUTO

RE: Pattern 7087

Dear Philip Gottfried, Esq.:

According to the limitation of claim statement on your application, this claim is based on new material added to preexisting elements. However, in your e-mail dated May 11, 2012, you have confirmed that there is no new artwork contained in "Pattern 7087" that was not already registered via "Pattern 7088." We therefore cannot register this claim because the new material does not contain a sufficient amount of original authorship.

To be protected by copyright, a work must contain original literary, artistic, or musical expression. If a work contains previously registered, previously published, or public domain material, the copyright in the revised version covers only the additions or changes appearing for the first time. **If a work contains only minor revisions or additions, or consists only of new material not protected by copyright, registration is not possible.**

Examples of material not protected by copyright include names, titles, short phrases, familiar shapes and symbols, typography, layout, format, or a mere change of size or coloring.

Because there is no basis for registration, we are closing your file without further action. The nonrefundable filing fees have been applied to administrative costs.

Wilbur King  
Registration Specialist  
Visual Arts Division  
U.S. Copyright Office

RECEIVED

MAY 21 2012

ADMINISTRATIVE DIVISION



## Copyright Registration for Derivative Works

A derivative work is a work based on or derived from one or more already existing works. Also known as a "new version," a derivative work is copyrightable if it includes what copyright law calls an "original work of authorship." Any work in which the editorial revisions, annotations, elaborations, or other modifications represent, as a whole, an original work of authorship is a derivative work or a new version.

A typical derivative work registered in the Copyright Office is a primarily new work but incorporates some previously published material. The previously published material makes the work a derivative work under copyright law.

To be copyrightable, a derivative work must differ sufficiently from the original to be regarded as a new work or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify a work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases, and formatting are not copyrightable.

### *Examples of Derivative Works*

The following are examples of the many different types of derivative works:

- Television documentary (that contains archival footage and photographs)
- Motion picture (based on a play)
- Novel in English (a translation of a book originally published in Russian)
- Sound recording (CD in which two of the ten selections were previously published online)
- Sculpture (based on a drawing)
- Drawing (based on a photograph)
- Book of maps (based on public-domain maps with some new maps)
- Lithograph (based on a painting)
- Biography of John Doe (that contains journal entries and letters by John Doe)
- Drama about John Doe (based on the letters and journal entries of John Doe)
- Super Audio CD (in which all the tracks were previously released in a CD and have been remixed)
- Words and music (that include words from the Bible)
- Words and musical arrangement (arrangement is based on a piece by Bach)
- Musical arrangement (based on a work by Bach)

### *Compilations and Abridgments*

Compilations and abridgments may also be copyrightable if they contain new works of authorship. When the collecting of the preexisting material that makes up the compilation is a purely mechanical task with no element of editorial



selection, or when only a few minor deletions constitute an abridgment, copyright protection for the compilation or abridgment as a new version is not available.

Some examples of copyrightable compilations are:

- Book of best short stories of 2006 (selected from stories published in magazines and literary journals in 2006)
- Sound recording of biggest pop hits of 2004 (selected from recordings released in 2004)
- Book of great news photos of 2002 (selected from newspapers and newsmagazines published in 2002)

In the above examples, original authorship was involved in deciding which were the best stories, the biggest hits, or greatest photos and in what order to present the respective works within the compilation.

### Copyright Protection in Derivative Work

The copyright in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work. It does not extend to any preexisting material and does not imply a copyright in that material.

One cannot extend the length of protection for a copyrighted work by creating a derivative work. A work that has fallen into the public domain, that is, a work that is no longer protected by copyright, can be used for a derivative work, but the copyright in the derivative work will not restore the copyright of the public-domain material. Neither will it prevent anyone else from using the same public-domain work for another derivative work.

In any case where a protected work is used unlawfully, that is, without the permission of the copyright owner, copyright will not be extended to the illegally used part.

### Right to Prepare Derivative Work

Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, a new version of that work. The owner is generally the author or someone who has obtained rights from the author. Anyone interested in a work who does not know the copyright owner can search the records of the Copyright Office or ask the Office to conduct a search for an hourly fee. For details, see Circular 22, *How to Investigate the Copyright Status of a Work*.

### Notice of Copyright

Before March 1, 1989, the use of copyright notice was mandatory on all published works, and any work first published before that date should have carried a notice. For works published on or after March 1, 1989, use of copyright notice is optional.

Although not required by law, it is perfectly acceptable (and often helpful) for a work to contain a notice for the original material as well as for the new material. For example, if a previously registered book contains only a new introduction, the notice might be © 1941 John Doe; introduction © 2008 Mary Smith. For information about copyright notice, see Circular 3, *Copyright Notice*.

### Copyright Registration

There are several ways to register a copyright with the U.S. Copyright Office. Online registration through the electronic Copyright Office (eCO) is the preferred way to register basic claims for literary works; visual arts works; performing arts works, including motion pictures; sound recordings; and single serials. Advantages of online filing include a lower filing fee; the fastest processing time; online status tracking; secure payment by credit or debit card, electronic check, or Copyright Office deposit account; and the ability to upload certain categories of deposits directly into eCO as electronic files. For details about eCO and other options for registering a copyright, see Circular 1, *Copyright Basics*, or SL 35, *Online Copyright Registration*.

Unfortunately, registration is often delayed because of mistakes or omissions in completing copyright applications. The following points should be helpful for those registering derivative works. The categories specified appear on copyright applications.

**Author** • Name the author(s) of the copyrightable material being claimed. Ordinarily, the author is the person who actually created the work. (Where the work or any contribution to it is a work made for hire, the employer is considered the author.) Do not name the author of previously published or registered work(s) or public-domain material incorporated into the derivative work, unless that person is also the author of the new material. The application should name only the author(s) of the new material in which copyright is claimed.

**Author Created** • Specify what the author(s) created. Examples include “text,” “translation,” “editing,” “music,” “lyrics,” “musical arrangement,” “photographs,” “artwork,” “compilation.”

**Year of Completion** · The year of completion is the year in which the new work—the particular version for which registration is sought—was fixed in a copy or phonorecord for the first time, even if other versions exist or if further changes or additions are planned. Do not confuse completion with publication.

**Publication** · Copyright law defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”

The following do not constitute publication: performing the work, preparing phonorecords, or sending the work to the Copyright Office.

The date of publication is the month, day, and year when the work for which registration is sought was first published. If the work has not been published, no date of publication should be given on the application.

**Copyright claimant** · The copyright claimant is either the author of the work or a person or organization who has obtained from the author all the rights the author initially owned. When the claimant named is not the author, a brief transfer statement is required to show how the claimant acquired the copyright. Examples are “by written agreement” and “by inheritance.” Do not send copies of documents of transfer with the application.

When the name of the claimant is not the name of the author, but the two names identify one person, the relationship between the names should be explained. Examples are “Doe Publishing Company, solely owned by John Doe” or “John Doe doing business as Doe Recording Company.”

**Previous registration** · If no registration has been made for this version or an earlier version of this work, leave this portion of the application blank.

If a previous registration for this work or another version of it was completed and a certificate of registration was issued, give the requested information about the previous registration, if known.

**Limitation of claim** · Complete this portion of the application if the work being registered contains a *substantial* amount of material that

- was previously published,
- was previously registered in the U.S. Copyright Office,
- is in the public domain, or

- is not included in the claim.

**Material excluded** · Briefly, in general terms, describe the preexisting material that has been recast, transformed, or adapted. See examples below. Do not complete this space for compilations.

**New material included** · Briefly, in general terms, describe all new copyrightable authorship covered by the copyright claim for which registration is sought. See examples below. All elements of authorship described in “author created” should be accounted for in “new material included.”

If the claim is in the compilation only, state “compilation” in “new material included.” If the claim is in the compilation and any other material, state both “compilation” and the material that has been compiled—for example, “compilation and foreword”; “compilation of photographs, additional photography, and foreword”; “compilation of recordings and liner notes”; “compilation of gospel songs, additional music, and foreword”; “compilation of 19th-century political cartoons, new foreword, and index.”

Examples for “Material Excluded” and “New Material Included” entries for derivative works:

- Motion picture based on the novel *Little Women*:  

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Entire Motion Picture
- New arrangement of preexisting music for piano:  

<i>Material Excluded:</i>	Music
<i>New Material Included:</i>	Musical Arrangement
- Two-act play expanded to a three-act play with editing throughout:  

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Text, Editing
- A new edition of Shakespeare’s *Romeo and Juliet* with a new introduction:  

<i>Material Excluded:</i>	Text
<i>New Material Included:</i>	Text
- A 1989 catalog that has been revised and to which new text and photographs have been added:  

<i>Material Excluded:</i>	Text, Photographs
<i>New Material Included:</i>	Text, Photographs, Editing
- Lithographic print of a 19th-century oil painting:  

<i>Material Excluded:</i>	Artwork
<i>New Material Included:</i>	Reproduction by photolithography [in “other” space]
- U.S. Geological Survey map of southern Virginia with additional maps and text added:  

<i>Material Excluded:</i>	Map
<i>New Material Included:</i>	Map, Text

- A CD containing previously published sound recordings on some tracks and new sound recordings on other tracks:

*Material Excluded:* Sound Recording

*New Material Included:* Sound Recording

- A new release of a sound recording first published in the 1980s with new photographs and text included in the CD package:

*Material Excluded:* Sound Recording

*New Material Included:* Photograph(s), Text of liner notes

- Remixed sounds from a 1970 recording by Sperryville Symphony of Bach Double Concerto

*Material Excluded:* Sound Recording

*New Material Included:* Remix

### For Further Information

#### By Internet

Circulars, announcements, regulations, application forms, and other related materials are available from the Copyright Office website at [www.copyright.gov](http://www.copyright.gov).

#### By Telephone

For general information about copyright, call the Copyright Public Information Office at (202) 707-3000 or 1-877-476-0778 (toll free). Staff members are on duty from 8:30 AM to 5:00 PM, Monday through Friday, eastern time, except federal holidays. Recorded information is available 24 hours a day. To request paper application forms or circulars, call the Forms and Publications Hotline at (202) 707-9100 and leave a recorded message.

#### By Regular Mail

Write to:

*Library of Congress  
Copyright Office—COPUBS  
101 Independence Avenue SE  
Washington, DC 20559-6304*

Philip Gottfried, Esq.

- 2 -

1-COSUTO

Enclosures:

Circulars 14, 31, 96 Sec. 202.1

Reply Sheet

# **EXHIBIT 3**



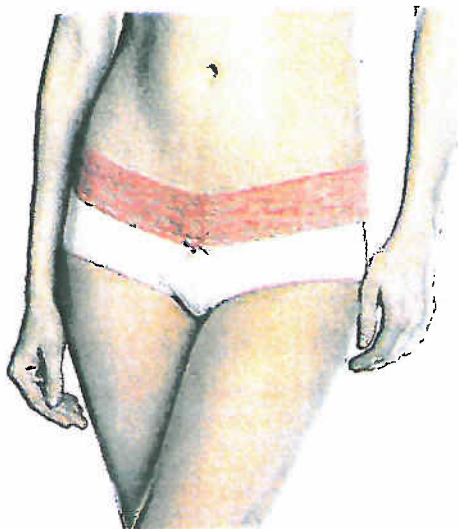
- Women
- Intimates
- Juniors
- Men
- Kids
- Shoes
- Jewelry & Watches
- Handbags & Accessories
- Beauty & Fragrance
- Home
- Bed & Bath

Search:

60% off Yellow Dot Clearance

Shopping Bag: 4 Items

Home > Intimates > Panties > Charmed By Maidenform Lace Hipster Briefs



Shown in: White  
[View Larger](#)

Available Colors



Product Details Shipping & Returns Customer Reviews

- Featured in black
- Contrast details add bold color
- Cotton/elastane
- Imported

### Charmed by Maidenform® Lace Hipster Briefs

Original: \$9.00  
**Sale: \$6.30**  
This product can be gift wrapped.  
Sheer panties featuring a lace waistband and flirty bow detail.

Be the first to [write a Review](#)

First, Select a Color  
Then, Select a Size

Quantity:

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### Recently viewed



Charmed by Maidenform® Lace Hipster Briefs - Purple Pink Animal Print  
Original Price: \$9.00  
**Sale Price: \$6.30**



Charmed by Maidenform® Lace Hipster Briefs - Gray/Blue  
Original Price: \$9.00  
**Sale Price: \$4.19**

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Investor Relations



[Facebook](#) "like" us on Facebook!  
facebook.com/bonton

[Mobile](#) Get coupons on your phone.  
Text "offers" to 266866

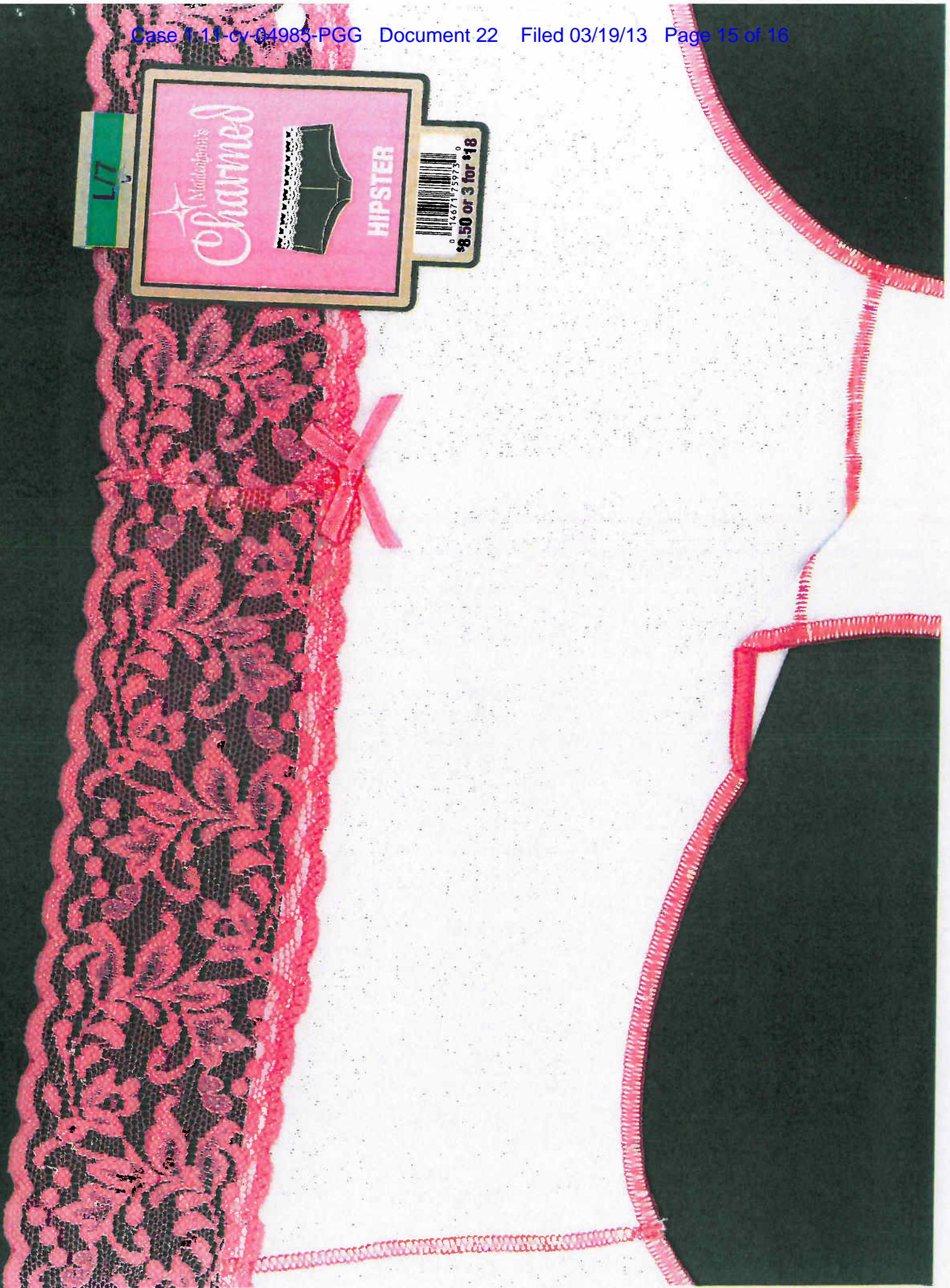
[Email](#) Get offers in your inbox.  
Sign up!

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@thebonton

[Blog](#) Bon-Ton Style blog  
Our virtual runway

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# BONTON

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Customer Pack Slip Number

04-27-2012 0194-9792-5248

COME TO THE RIGHT PLACE®

**Ship To:**MARA DE LA ROSA  
KLAUBER BROTHERS  
980 AVENUE OF THE AMERICAS

NEW YORK, NY 10018

**Bill To:**MARK KLAUBER  
980 AVENUE OF THE AMERICAS

NEW YORK, NY 10018

**Payment Method:** BANK CARD**Customer Service:****Phone:** 1-800-945-4438  
**Email:** orders@bonton.com

Daily, 6AM - Midnight (CST)

MAY - 3 2012

Customer Order	Resv/Ship Number	Order Date	Shipped Via
018226070	892130401	04/27/2012	UPS

Qty Ordered	Qty Shipped	UPC	Product Description	Unit Price	Unit Tax	Return Qty	Return Reason
1	1	014671759518	Charmed by Maidenform Lace Hipster Briefs - Gray/Blue L	4.19	0.00		
1	1	014671765328	Charmed by Maidenform Lace Hipster Briefs - Purple Pink	6.30	0.00		
1	1	014671759600	Charmed by Maidenform Lace Hipster Briefs Black L	6.30	0.00		
1	1	014671759730	Charmed by Maidenform Lace Hipster Briefs White L	6.30	0.00		

Resv/Ship Number

892130401



892130401